

**STATE OF ARIZONA**  
**OFFICE OF ADMINISTRATIVE HEARINGS**

**R. B.**, a minor, by and through parent R. B., No. 03F-II03005-ADE

Appellant/Petitioner,

-V-

**Wickenburg Unified School District,**

Respondent.

**DECISION AND ORDER OF THE  
ADMINISTRATIVE LAW JUDGE  
(LEVEL II REVIEW)**

This is a final administrative appeal brought by R. B. ("Parent"), on behalf of R. B. ("Student"), for review of a Due Process Hearing Officer's Decision and Order upholding an Individualized Educational Program ("IEP") and placement change to Student's home school district made by Respondent Wickenburg Unified School District ("Respondent School District").<sup>1</sup> Pursuant to Arizona Revised Statutes (A.R.S.) §§ 41-1092.01(E) and 41-1092.02, the Arizona Department of Education referred this matter to the Office of Administrative Hearings for final administrative hearing appeal as provided in Arizona Administrative Code (A.A.C.) R7-2-405(J). The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487 (as re-authorized and amended in 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the Arizona Special Education ("SPED") statutes, A.R.S. §§ 15-761 through 15-772, and implementing rules, A.A.C. R7-2-401 through R7-2-406. Parent and Student are represented by attorney M. Alex Harris. Respondent School District is represented by attorney Patrice Horstman.

On August 15, 2002, Parent filed a request for due process hearing challenging an Individualized Educational Program ("IEP") and change in Student's placement by Respondent School District. The due process hearing in this matter was conducted on October 8, 9 10, 23, 24 and 30, 2002. The Level I Hearing Officer's Decision was issued on November 19, 2002, determining that Respondent School District's actions

<sup>1</sup> This Decision upon Review will use the designations in the Index of Providers created and used by the Due Process Hearing Officer to protect Student's confidentiality.

1 were appropriate. Parent filed a timely appeal on November 21, 2002. At Parent's  
2 request, this Administrative Law Judge ordered the parties to file briefs for the appeal.  
3 The final brief was filed on January 24, 2003. Because of the voluminous record for  
4 review, this matter has been under advisement throughout February 2003.

5 The record reviewed by this Administrative Law Judge consists of Parent's initial  
6 complaint, prehearing correspondence and orders, six volumes of hearing transcripts  
7 (approximately 1400 pages), numerous exhibits admitted into evidence at the hearing,  
8 the Due Process Hearing Officer's Decision issued by Hearing Officer Edward E. Vance  
9 (hereinafter "Hearing Officer's Decision"), and Parent's request for appeal. Based on a  
10 review of the record and consideration of the parties' Level II Review Briefs, this  
11 Administrative Law Judge makes the following Decision and Order upholding and  
12 adopting the Hearing Officer's Decision in its entirety.

## 13 **DECISION**

### 14 **Standard of Review**

15 This is a second-level administrative review. Both federal and state law require  
16 that the reviewing official "make an independent decision." 20 U.S.C. § 1415(g); see  
17 *also* A.A.C. R7-2-405(J)(1)(b)(i) and (v). This tribunal may exercise non-deferential  
18 review, except that deference will be given to any findings of a hearing officer based on  
19 credibility judgments. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 889 (9<sup>th</sup> Cir.  
20 2001); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995). Therefore, this  
21 tribunal is not generally bound by a hearing officer's factual or legal conclusions. Like  
22 the first-level hearing officer, this tribunal must determine whether Respondent School  
23 District has met all requirements of federal and state law, rules, and regulations  
24 concerning provision of a free appropriate public education for children with disabilities.  
25 See A.A.C. R7-2-405(H)(4)(a).

### 26 **Level I Hearing**

#### 27 **The Issues at Hearing**

28 The Hearing Officer identified four issues, with sub-issues, for the Level I  
29 decision: (1) Did Respondent School District violate Student's right to a free appropriate  
30 public education by (a) allegedly predetermining Student's placement at District School  
on or before a May 15, 2002, meeting without input from Parent?, (b) allegedly

1 informing Parent that District invested too much money to continue Student's education  
2 at Special School?, (c) allegedly holding an IEP meeting on August 6, 2002, without re-  
3 scheduling the meeting for a time and date that Parent could attend?; (2) Does the  
4 August 2002 IEP prepared by Respondent School District provide Student with a free  
5 appropriate public education including (a) Can Respondent School District provide  
6 Student with a safe educational environment at District School?, (b) Is the proposed  
7 August 2002 IEP appropriate?; (3) Is Parent entitled to reimbursement for past  
8 transportation expenses to Special School?; and (4) Is Student entitled to related  
9 services of transportation?" The parties agreed to litigate those issues at the hearing.  
10 As discussed below with respect to the October 7, 2002, revision of the August 2002  
11 IEP, however, those issues might not have accurately stated the dispute between the  
12 parties at the time that the Level I hearing began. In any event, the crucial issue  
13 between the parties was the change of Student's placement.

14 For the reasons stated below, this tribunal affirms the Hearing Officer's Decision  
15 in its entirety. The evidence and law supports placement of Student at the school in his  
16 home school district, supports the conclusion that both the August 2002 IEP and the  
17 revised IEP of October 2002 are designed to provide educational benefit to Student,  
18 and supports the conclusion that Respondent School District provided Student a free  
19 appropriate public education. The evidence does not support reimbursing Parent for  
20 transportation services because Parent unilaterally provided those services.

### 21 The Hearing Officer's Decision

22 The Findings of Fact stated in the Hearing Officer's Decision are found to be  
23 thorough, accurate, and complete, and are adopted and incorporated into this Decision  
24 and Order. Also, the Hearing Officer's conclusions are accurate and are supported by  
25 the record and law. With respect to credibility determinations, this tribunal affords great  
26 deference to the Level I Hearing Officer. *Amanda J. v. Clark County Sch. Dist.*, 267  
27 F.3d 877, 889 (9<sup>th</sup> Cir. 2001). The Hearing Officer made several specific and important  
28 credibility determinations. (Hearing Officer's Decision, Findings of Fact 5, 23, 27, 32,  
29 33, 46, and 51.) These determinations go to the heart of the issues and will not be  
30 overturned. Indeed, there is no evidence in the record sufficient to overturn the Hearing  
Officer's Decision.

The Facts

The more probative parts of the Decision are summarized as follows. The relevant time period is August 2002 and the months preceding and following it.

Student is an eight-year-old child with autism who lives within the Respondent School District. In August 2002 he had been attending Special School, which specializes in educating children with autism, for two years. Student had been placed there under the two prior annual IEPs because Respondent School District did not have a qualified special education teacher or a program that could adequately educate a child with autism. Respondent School District, however, had spent the two years building a program that it believed would meet Student's needs. Respondent School District had made it clear throughout the two years that its goal was to place Student back at District School as soon as the program was ready. Parent was hesitant for Student to return to District School. Also, for the two-year period, Parent voluntarily chose to transport Student to Special School in the mornings. Respondent School District hired and paid a driver to transport Student back home after school.

On May 15, 2002, Respondent School District held a meeting between Parent, Special School, and Respondent School District to discuss Student's summer program and Student's transition from Special School back to Respondent School District for the next school year. Parent had concerns about District School, but did not voice opposition to Student returning to District School until the Summer of 2002. At that time, it was clear that Respondent School District wanted to change Student's placement to District School.

On July 22, 2002, Respondent School District sent an IEP meeting notice to Parent and Special School for an IEP meeting to be held on August 6, 2002. Special School was available and stated its intention to be at the meeting. Parent, however, sent Respondent School District a letter stating that he was not available for a meeting on any day until August 26, 2002, 14 days after the start of school in Respondent School District and 7 days after the start of school at Special School. Parent knew that Student's placement could not be changed until a new IEP was formulated. Respondent School District was willing to meet at any time before the start of school in Respondent School District on August 12, 2002, or to accommodate Parent in any other

1 way so that he could participate in a meeting held before the start of school. Parent  
2 unreasonably refused to meet at any time before August 26, 2002, or to participate  
3 telephonically. Thus, Parent intentionally tried to thwart any change of Student's  
4 placement by attempting to prevent an IEP team from meeting before school started.  
5 Parent also influenced Special School to fail to appear at the August 6, 2002, IEP  
6 meeting.

7 Respondent School District proceeded with the August 6, 2002, IEP meeting  
8 without the participation of Parent or Special School. An IEP was drafted and Student's  
9 placement was changed to District School. Parent filed a request for hearing and  
10 invoked the "stay put" provisions of the IDEA that kept Student at Special School  
11 pending the outcome of the administrative hearing process.

12 Because Parent and Special School were voluntarily absent from the August 6,  
13 2002, IEP meeting, Respondent School District did not have fully up-to-date information  
14 about Student's present levels of performance. Because of this, the August 2002 IEP  
15 was not ideal, but still was reasonably calculated to provide educational benefit to  
16 Student. Because everyone involved recognized that participation by both Parent and  
17 Special School would result in a better IEP for Student, a full IEP team, including  
18 Parent, Special School, and Respondent School District, met on October 7, 2002, one  
19 day before the Level I hearing began. At that meeting, a revised IEP was created.  
20 Parent attended that meeting but voluntarily left after only a short time. However, since  
21 Special School fully participated in that meeting, the October 2002 revised IEP provides  
22 even more educational benefit to Student.

23 The Hearing Officer found against Parent on every issue. He found that  
24 Respondent School District complied with the procedural and substantive requirements  
25 of the IDEA in the August 2002 IEP, as revised by the October 2002 IEP. He also found  
26 no merit to Parent's claim for transportation reimbursement. The evidence supports  
27 those findings. There are no substantial errors in the Hearing Officer's Decision.

## **Level II Review**

### **The Issues on Appeal**

28 Parent uses a "shotgun" approach in his Level II Review Brief, citing very little  
29 case law or statutory authority and failing to develop his arguments. Many of his  
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1 statements are procedural “nitpicks” (some of which are inaccurate) on rulings that were  
2 within the Hearing Officer’s discretion and for which Parent does not show how he was  
3 prejudiced. (See, Appellant/Petitioner’s Level II Review Brief at 3-5, 6, and 7.) Such  
4 “pebbles” do not amount to anything significant and are easily dismissed. Cf.  
5 A.R.S. § 41-1092.07(F)(1) (“Neither the manner of conducting the hearing nor the failure  
6 to adhere to the rules of evidence required in judicial proceedings is grounds for  
7 reversing any administrative decision or order if the evidence supporting the decision or  
8 order is substantial, reliable and probative.”) On the other hand, Parent’s arguments  
9 regarding the August 2002 IEP meeting and the October 2002 revised IEP merit some  
10 discussion.

### 11 Discussion

12 Through the IDEA, Congress has sought to ensure that all children with  
13 disabilities are offered a free appropriate public education that meets their individual  
14 needs. 20 U.S.C. §1400(d); 34 C.F.R. § 300.1. These needs include academic, social,  
15 health, emotional, communicative, physical, and vocational needs. *Seattle Sch. Dist.*  
16 *No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983  
17 U.S.C.C.A.N. 2088, 2106). A free appropriate public education must consist of  
18 “personalized instruction with sufficient support services to permit the child to benefit  
19 educationally from that instruction.” *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v.*  
20 *Rowley*, 458 U.S. 176, 204 (1982). The law greatly favors “mainstreaming” children  
21 with disabilities by requiring that “to the maximum extent appropriate, children with  
22 disabilities . . . are educated with children who are not disabled. . . .” 20 U.S.C. §  
23 1412(a)(5)(A); A.R.S. § 15-764(A)(3). This means that “special classes, separate  
24 schooling or other removal of children with disabilities from the regular educational  
25 environment occurs only if the nature or severity of the disability is such that education  
26 in regular classes with the use of supplementary aids and services cannot be achieved  
27 satisfactorily.” 34 C.F.R. § 300.550(b)(2). Furthermore, it means that a child must, if at  
28 all possible, be educated in the school that he or she would attend if nondisabled.  
29 34 C.F.R. § 300.552(c).

30 Therefore, Parent’s argument that Respondent School District’s intent to place  
Student back at District School was an improper predetermination of placement or a

1 violation of IDEA is wholly without merit. The IDEA *mandates* educating children with  
2 disabilities in the least restrictive environment from which they can obtain educational  
3 benefit. Respondent School District is responsible for educating Student in such a  
4 manner and was pursuing that goal for two years, in full view of Parent. The issue then  
5 is not Respondent School District's intent, but whether placement at District School as  
6 provided in the August 2002 IEP and October 2002 revised IEP is reasonably calculated  
7 to provide Student educational benefit. The greater weight of the evidence shows that it  
8 is so calculated.

9 Parent also challenges the Hearing Officer's rulings regarding the October 2002  
10 revised IEP. The Hearing Officer made clear, both at the hearing and in the Hearing  
11 Officer's Decision, that the October 2002 revised IEP was admitted only for the limited  
12 purpose of verifying the accuracy of testimony by many of the witnesses. (Hearing  
13 Officer's Decision at 5.) That ruling was discretionary with the Hearing Officer. It was  
14 within the permissible options of the Hearing Officer and will not be overturned.<sup>2</sup>

15 In sum, the Hearing Officer conducted a fair and impartial hearing of the  
16 evidence that was relevant and probative to the issues identified by the parties. The  
17 evidence supports the Hearing Officer's conclusions that Respondent School District  
18 complied with the procedural and substantive requirements of the IDEA, that Student's  
19 proposed placement at District School is proper, and that Respondent School District  
20 need not reimburse Parent for transportation expenses.

### 21 **ORDER**

22 Based on the discussion above, the Hearing Officer's Decision is  
23 **affirmed.**  
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25 <sup>2</sup> In this reviewing tribunal's view, when the hearing began on October 8, 2002, the issues between the  
26 parties had changed slightly. Because Parent had voluntarily cooperated and attended the October 7,  
27 2002, IEP team meeting to revise the IEP, Parent likely waived his objections to the substance of the  
28 August 2002 IEP. The August 2002 IEP was to be replaced. There was no point to disputing the  
29 substance of it when Parent had voluntarily participated in revising it. Parent made no objection to the  
30 IEP team or to the Hearing Officer. The dispute, then, at the start of the hearing, concerned mainly the  
alleged procedural violations regarding the August 2002 IEP, the substance of the revised IEP, and the  
issue of reimbursement for transportation. The Hearing Officer could have modified the issues for  
hearing at that point and gone forward from there. However, the parties did not raise that option and the  
Hearing Officer chose another reasonable option.

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**RIGHT TO SEEK JUDICIAL REVIEW**

Pursuant to Arizona Administrative Code (A.A.C.) R7-2-405(22), this Decision and Order is the final decision at the administrative level. Any party aggrieved by the findings and decisions made in a hearing or in an appeal review has the right to judicial review. Any action for judicial review must be filed within 35 days of the date that the Decision and Order was mailed to the parties.

Done this 3<sup>rd</sup> day of March 2003.

**OFFICE OF ADMINISTRATIVE HEARINGS**

\_\_\_\_\_  
Eric A. Bryant  
Administrative Law Judge

Copy mailed by certified mail (No. \_\_\_\_\_)  
this \_\_\_\_ day of March 2003, to:

M. Alex Harris  
Law Office of M. Alex Harris  
2999 N. 44<sup>th</sup> Street, Suite 303  
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. . .

Copy mailed by certified mail (No. \_\_\_\_\_)  
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Patrice Horstman,  
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Attorneys for Respondent

Copies mailed by regular/interdepartmental mail



1 this \_\_\_\_ day of March 2003, to:

2 Steven Mishlove, Exceptional Student Services  
3 Arizona Department of Education  
4 1535 West Jefferson  
5 Phoenix, AZ 85007  
6 ATTN: Theresa Schambach

7 Edward E. Vance, Due Process Hearing Officer  
8 14014 N. 8<sup>th</sup> Place  
9 Phoenix, AZ 85022

10 By \_\_\_\_\_